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IN THE

Supreme Court of the United States

CHIEF PRENTICE EARL SANDERS, DAVID R. L. ROBINSON,
ESPANOLA SANDERS and
RAMONA L. McCUNE -ROBINSON,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO,
BOARD OF SUPERVISORS, and TERENCE HALLINAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court reexamine whether prosecutors are entitled to absolute immunity from actions brought under 42 U.S.C. § 1983 for violations of federal constitutional rights, or whether the defense of qualified immunity is a sufficient protection to defendants in such actions?

2. Should the Court grant certiorari in order to resolve confusion and conflicts among the courts of appeals as to the questions of what investigative actions by a prosecutor result in qualified immunity; when a prosecutor acts as a complaining witness rather than an advocate; and whether a prosecutor is entitled to absolute immunity for initiating and prosecuting a case when he or she knows that there is no probable cause?

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Petitioners, Earl Prentice Sanders, David R. L. Robinson, Espanola Sanders, and Ramona L. McCune-Robinson, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set out in Appendix A at pages 1a-11a, and is unreported. The Order of the Court of Appeals denying petitioners' petition for rehearing and rehearing en banc is set out in Appendix C at pages 29a-30a, and is unreported. The decision of the United States District Court for the Northern District of California is set out in Appendix B at pages 12a -28a, and is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 2007, and the order denying the timely petition for rehearing and rehearing en banc was entered on May 3, 2007. On July 31, 2007, Justice Kennedy granted petitioners' application for an extension of time to file the petition for writ of certiorari to August 31, 2007. (Appl. No. 07A61.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. Sec. 1979; Pub. L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, Sec. 309(c), Oct. 19, 1996, 110 Stat. 3853.

STATEMENT OF THE CASE

This case seeks review of the decision of the Court of Appeals for the Ninth Circuit in an appeal from an order entered in favor of respondents City and County of San Francisco, Terence Hallinan, and the Board of Supervisors of San Francisco and against petitioners Prentice Earl Sanders, David R. L. Robinson, Espanola Sanders, and Ramona L. McCune-Robinson on all claims following the granting of respondents' motion to dismiss the petitioners' federal causes of action. The action was brought against officials of the City and County of San Francisco, as well as the City and County itself, for alleged violations of the petitioners' federal constitutional and statutory rights. The action was dismissed on the basis that respondent District Attorney Terrence Hallinan enjoyed absolute prosecutorial immunity for all of the activities alleged in the complaint. The District Court also dismissed petitioners' ten state law causes of actions without

prejudice to the petitioners' pursuing those claims in state court.[1]

The Court of Appeals affirmed the determination of absolute immunity, but reversed the dismissal of the claims based on DA Hallinan's defamatory statements to the media on a limited basis. The case was remanded to the district court with leave to amend the complaint to allege causation between DA Hallinan's defamatory statements and the suspension of petitioner Sanders from his position in retaliation for petitioner's constitutionally protected speech. App. 6a-8a.

STATEMENT OF FACTS

A. The Parties.

This action was brought by four plaintiffs, petitioners here, Prentice Earl Sanders, the former chief of police of the City of San Francisco, David R. L. Robinson, the Deputy Chief of Police, and their respective spouses, Espanola Sanders and Ramona L. McCune-Robinson. They sued under 42 U.S.C. §§ 1983 and 1985 for federal civil rights violations, as well as a variety of California state law

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[1]The state law claims included malicious prosecution, abuse of process, false arrest, defamation, invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, loss of consortium, and violations of California Labor Code §§ 1102 and 1102.5, and the Unruh Act, California Civil Code §§ 52.1 and 52.3. Comp. p. 1, 18-23, ¶¶ 65-90, 27-28, ¶¶ 113-20. Following the district court's dismissal of the complaint in this case, an action was filed by petitioners in Superior Court in San Francisco on the state law claims. If petitioners are successful here, they will pursue their state law claims in federal court under its supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

provisions.[2]

The defendants, respondents here, the City and County of San Francisco, the former District Attorney of San Francisco, Terence Hallinan, and the San Francisco Board of Supervisors, were sued in their official capacities for actions committed under color of state law. It was alleged that the acts of the defendants had deprived the plaintiffs of rights secured under the Constitution and laws of the United States, including the rights to due process and equal protection of the laws and the right to freedom of speech, as well as rights guaranteed by the Constitution and laws of the State of California.

Petitioner, Prentice Earl Sanders [hereinafter "Chief Sanders"] has had a long and distinguished career in law enforcement, culminating in his service as Chief of Police of the City of San Francisco. Comp. p. 2-3, ¶¶ 1-6; p. 5, ¶¶ 16-17.[3] Petitioner David R. L. Robinson [hereinafter "Deputy Chief Robinson"] also had a long and distinguished career and was appointed to the position of Deputy Chief of Police for San Francisco on July 24, 2002. Comp. p. 5, ¶¶ 18-19. As detailed below, their careers were interrupted and attempted to be destroyed by the acts of respondent Terence Hallinan, the District Attorney for the City and County of San Francisco [hereinafter "DA Hallinan"] acting in concert with, and with the acquiescence and approval of, respondents the City and County of San Francisco and the Board of Supervisors

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[2]See n. 1, *supra*.

[3]Record references are to the complaint, the allegations of which were accepted as true by the lower courts for the purpose of deciding the respondents' motion to dismiss.

thereof.[4]

B. The Incident.

The events leading up to the filing of this action began when three off-duty police officers employed by San Francisco and two private citizens became involved in a street fight. Comp. p. 5, ¶ 20. Because one of the officers was the son of Assistant Chief of Police Alex Fagan, the incident received wide attention from the media. Chief Fagan disqualified himself from any involvement in the case, including the criminal investigation and any internal affairs investigation. Comp. p. 6., ¶ 21

C. The Initial Police Investigation.

On November 20, 2002, Police Lieutenant Dutto of the San Francisco Police Department (hereinafter "SFPD") assigned two inspectors to conduct a full investigation of the incident. By December 3, 2002, the assigned inspectors had completed their investigation and the case was solved. The evidence was assembled and presented to DA Hallinan on that date. Comp. p. 6-7, ¶ 24. He returned the file to the SFPD requesting further investigation, primarily to survey the locale of the incident to determine if there were any non-participant eyewitnesses to the fight. Further police investigation disclosed two such witnesses. Comp. p. 6-7, ¶¶ 24-25 .

At this point, the police investigation had solved the case and had provided DA Hallinan with all the facts necessary to make a legitimate prosecutorial decision on whether and how to proceed. Thus, the legitimate

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[4]The complaint also named 100 Doe defendants whose true names would be added. Because the complaint was dismissed before discovery took place, none of the Doe defendants have been identified or named as yet.

investigation into the incident had been completed. Comp. p. 7, ¶ 25.

D. The Investigatory Actions of DA Hallinan

On or about November 22, 2002, and continuing, the conspiracy between DA Hallinan and others to deprive petitioners of their constitutional rights began. On December 2, 2002, DA Hallinan met with Chief Sanders. DA Hallinan suggested that Chief Sanders direct the three suspect officers to admit and plead guilty to misdemeanors. Comp. p. 6, ¶ 23. In this way, DA Hallinan emphasized, the three officers' cases could be disposed of in much the same manner as was an assault case against DA Hallinan's son. Chief Sanders did not believe it was appropriate to respond to DA Hallinan's suggestions since the investigative report from the Police Department was due to be presented the next day, December 3, 2002. *Ibid.*

As noted above, DA Hallinan was given the investigative file on December 3, 2002, and, at his request, a further investigation was held into the circumstances of the incident that produced additional witnesses. However, the referral of the investigation by DA Hallinan back to the SFPD resulted in an investigation of the investigators, including Chief Sanders, Deputy Chief Robinson, and other police brass. Without any evidence or any probable cause, DA Hallinan prevailed on Lt. Dutto to investigate every police officer – no matter their rank or role in the case – about the propriety of the investigation of the street brawl. Comp. p. 7, ¶¶ 26-27. The purpose of DA Hallinan in requesting this additional investigation was to generate evidence that would implicate the petitioners in an alleged cover-up or obstruction of justice, even though he had no basis to believe that there was in fact any such cover-up or obstruction of justice.

On December 11, 2002, the SFPD submitted its entire file to DA Hallinan. The only additional evidence was the arrival of lab results and the statements of two street witnesses who added nothing significant to the circumstances of the incident. Instead of exercising his proper prosecutorial responsibilities, DA Hallinan began a "scorched earth" campaign, attacking the integrity of the investigation and the integrity of Chief Sanders, Deputy Chief Robinson, and the SFPD. Comp. p. 7, ¶ 27 .

E. DA Hallinan's Media Campaign.

The alleged reason for DA Hallinan's instigating a spurious investigation and making false statements to the media was in retaliation for Chief Sanders' refusal to corrupt the criminal justice system as DA Hallinan proposed and for Chief Sanders' reporting DA Hallinan's unethical proposals to the Mayor of San Francisco. Comp. p. 13-15, ¶¶ 44-49. Thus, as recited above, on December 2, 2002, DA Hallinan met with Chief Sanders and suggested that the suspect officers admit to a street fight and it would be disposed of in the same manner as DA Hallinan's son's assault case had been handled.

On January 13, 2003, DA Hallinan made similar suggestions during a meeting with Chief Sanders at a meeting held, at DA Hallinan's request, away from the Hall of Justice. At this second meeting DA Hallinan told Chief Sanders that he wanted the case settled by having the officers involved in the incident plead to a misdemeanor "and I'll give them a slap on the wrist. Just like my son's case." Comp. p. 13-14, ¶ 45. Chief Sanders was shocked by DA Hallinan's repeated overt solicitations to interfere with the legal rights of the parties to the fight. Chief Sanders refused any further meetings with DA Hallinan and informed the mayor and the executive director of the mayor's Council on Criminal Justice of DA

Hallinan's unethical proposals and solicitations. Comp. p. 14, ¶¶ 46-47.

Because of Chief Sanders' refusal to agree to his proposals and because he reported the same, DA Hallinan orchestrated a media campaign defaming the integrity of Chief Sanders and the SFPD top leadership. He also intensified his investigation of the investigators and completely took over the police investigation. DA Hallinan refused to make a charging decision on the three off-duty officers and instead sought to implicate officers, ranking members and command staff in a phony cover-up. Comp. p. 14, ¶ 48.

As part of DA Hallinan's attempt to destroy the reputations and careers of the Petitioners, he made numerous false statements and allegations in the media. These false statements were intended to imply and did imply that Chief Sanders and Deputy Chief Robinson committed intentional lapses in their investigation of the incident in an effort to cover-up wrongdoing by themselves and other SFPD officers. For example, in an interview on television, DA Hallinan stated that the police investigation of the incident has "Watergate aspects" that included reassigning Lt. Dutto "at a critical point," not following normal procedures in the investigation so that "nothing was done in a normal fashion," and stalling investigators in their efforts to investigate. Comp. p. 10-11, ¶¶ 36-38. *See also*, Comp. pp. 19-20, ¶¶ 66-72, for further false statements made by DA Hallinan to the media that were intended to imply that the petitioners committed intentional lapses in their investigation in an effort to cover-up wrongdoing by themselves and other SFPD officers.

DA Hallinan made similar statements on public television, falsely claiming that the reassignment of Lt. Dutto

"has almost Watergate aspects to it," making a false and inflammatory reference to President Nixon's removal of the Special Prosecutor because he was in the process of presenting evidence of the President's cover-up of the Watergate burglary. DA Hallinan made these statements even though he knew that neither Chief Sanders nor any member of his staff had engaged in a "cover-up" of the investigation of the incident. In fact, DA Hallinan knew or should have known that Lt. Dutto's transfer was part of a long-planned restructuring of the Bureau of Inspectors of the SFPD. Comp. p. 12, ¶¶ 39-40.[5]

F. The Baseless Indictment, Arrest and Arraignment of Petitioners.

As part of the continuing effort to defame and injure Chief Sanders and Deputy Chief Robinson, on or about February 27, 2003, DA Hallinan went before a Grand Jury even though he knew he had no probable cause to believe that either of them had committed any crime. DA Hallinan falsely urged, incited, and inflamed the Grand Jury, with no evidence, that Chief Sanders, Deputy Chief Robinson, and other members of the SFPD's top ranking staff obstructed the investigation of the incident to issue an indictment. Even

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[5]Other false statements made by DA Hallinan were that the SFPD "did not collect clothes of assailants;" that the SFPD "should have performed a DUI test" as part of the investigation; that there was no "Cold Show" of suspects and that this was evidence of a cover-up; and "there is a division within the department between the working cops, who want the real facts, and the brass, who are making it real difficult for those officers to do their job." These statements were intended to imply that the petitioners committed intentional lapses in their investigation in an effort to cover-up wrongdoing by themselves and other SFPD officers. Comp. p. 19-20, ¶¶ 66-72.

though he admitted to the Grand Jury that he had no evidence of conspiracy by petitioners, he falsely and maliciously continued to assert to the Grand Jury accusations of wrong doing and obstruction of justice. Comp. p. 8, ¶¶ 29-31; p.16, ¶¶ 52-56.[6]

The result of these actions, which were also taken to advance DA Hallinan's political career (Comp. p 16, ¶ 56) was that the Grand Jury returned a groundless indictment against Chief Sanders, Deputy Chief Robinson, and their command staff. Comp. p. 8, ¶ 30.

The wrongful prosecution of the petitioners by DA Hallinan compelled them to be arrested, fingerprinted, subjected to police mug-shots, arraigned, and treated like common criminals. In the courtroom during his arraignment on March 3, 2003, Chief Sanders suffered a stroke. Comp. p. 8-9, ¶ 32.

On March 11, 2003, DA Hallinan dismissed the charges against Chief Sanders and Assistant Chief Fagan, Sr. Comp. p. 9, ¶ 33. On April 4, 2003, the San Francisco Superior Court heard a motion by Deputy Chief Robinson and others to dismiss the Grand Jury indictments against them. The Court granted the motion and made findings that DA Hallinan had told the Grand Jury that there was not enough evidence to indict on a conspiracy charge and had failed to dismiss the charges when he himself admitted there was no evidence to support the charges. Comp. p. 9, ¶ 34, and Exhibit 2. Finally, Chief Sanders made a motion for a finding a factual innocence pursuant to California Penal Code §

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[6]In fact, the only "evidence" presented to the grand jury to support the indictments were DA Hallinan's false statements that "We have run into obstruction after obstruction." Comp. P. 8, ¶ 30.

851.8, which was granted on August 20, 2003. The finding of factual innocence under this section is based upon a finding "that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested is guilty of the crimes charged." Comp. p. 9-10, ¶¶ 35-36, Exhibit 3.

G. The Injury to the Petitioners.

The purpose and intent of DA Hallinan was to retaliate against and injure Chief Sanders and Deputy Chief Robinson for refusing to go along with DA Hallinan's improper attempts to avoid carrying out his proper prosecutorial functions, and to advance his own political agenda. As a result, petitioners Sanders and Robinson "suffered the loss of their employment." They suffered public humiliation. They spent substantial sums of money to defend themselves against baseless investigations, DA Hallinan's false public statements, and false and baseless criminal charges, and they were severely injured in both their mental and physical health. Their exemplary careers in law enforcement were effectively brought to an end, and their rights under the Constitution and laws of the United States and the State of California were violated in a variety of ways. Comp. p. 28; ¶ 121.[7]

H. The Decision of the Court of Appeals

The Ninth Circuit affirmed the dismissal of petitioners' claim that their constitutional rights had been violated when the district attorney "directed and participated in a criminal investigation" into their activities "despite

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[7]Their spouses, petitioners Esapanola Sanders and Ramona L. McCune-Robinson, pled loss of consortium and related damages, rights that arise under California law. Comp. P. 28, ¶¶ 118-120

lacking probable cause to do so," on the grounds that no probable cause needs to exist before an investigation begins and that they had no constitutionally protected property interested in continuing employment with the police department. App. 2a-3a.

The court of appeals also dismissed the petitioners' claims that their constitutional rights had been violated when DA Hallinan convened a grand jury and secured an indictment "despite lacking probable cause." The court held that the district attorney's "decision to convene a grand jury to indict [petitioners] is" an activity as to which he was entitled to absolute immunity "even if done while lacking probable cause." App. 3a. Further, the court rejected the contention that the district attorney was acting as a complaining witness, not an advocate, when he stated to the grand jury that "we have run into obstruction after obstruction." App. 4a.

REASONS FOR GRANTING THE WRIT

A recent comprehensive and scholarly review of the law, has concluded that

> Absolute prosecutorial immunity should be reconsidered.... Qualified immunity provides sufficient protection to the honest prosecutor, while permitting the development of constitutional doctrine, the evolution of enforceable professional norms, and the implementation of needed remedies. Ultimately, prosecutorial accountability for constitutional misconduct will enhance the integrity of the criminal justice system

Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 149 (hereinafter, "Johns").

This case presents an ideal opportunity to reexamine the issue of whether prosecutors should enjoy absolute immunity and to resolve ongoing confusion among the lower federal courts regarding the scope and appropriateness of the immunity to be provided prosecutors.

I.

CERTIORARI SHOULD BE GRANTED TO RECONSIDER THE QUESTION OF WHETHER PROSECUTORS SHOULD BE AFFORDED ABSOLUTE IMMUNITY

A. The Problem of Prosecutorial Misconduct Is of National Importance

In her article, Ms. Johns discusses a number of recent studies documenting the scope and seriousness of the problem of misconduct by prosecutors. *See*, Johns, at 53; 59-71. For example, one study published in 2003 reported findings that since 1970 there had been over 2,000 cases in which prejudicial prosecutorial misconduct required the dismissal of charges, reversals of convictions, or reductions of sentences, as well as thousands of other cases in which prosecutorial misconduct was found.[8]

The present case involves the abuse of the office of prosecutor in order to retaliate against other public officials for their refusal to go along with a proposal that was of dubious ethicalness, because they had reported DA Hallinan's proposal to their superiors, and for the district attorney's perceived political gain. Another recent case of the misuse of the power of a prosecutor for political gain, this time in North

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[8]CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS, i, 2; app. at 108-09 (2003).

Carolina, has been widely reported in the press.[9]

B. Victims of Prosecutorial Misconduct Lack Effective Redress for the Injuries They Have Suffered

In *Imbler v. Pachtman*, 424 U.S. 409 (1976) the Court assumed that alternative remedies to damage actions were available to control and deter illegal and unconstitutional actions of prosecutors. Thus, criminal prosecution and discipline by state bars were given as examples of ways to control prosecutorial misconduct. 424 U.S. at 429.

However, as the Court acknowledged in *Imbler*, these remedies, and even the reversal of a criminal conviction wrongly obtained, do not provide a wronged person with adequate redress for his or her own injuries. Only an action in which damages can be recovered can provide such a remedy.

Moreover, the instances in which prosecutors have been prosecuted for violating constitutional rights, or even disciplined for so doing, are few and far between.[10] Thus, in fact, there is little or no deterrence for prosecutorial misconduct, as contrasted to the incentive of political gain offered the unscrupulous prosecutor in obtaining a conviction by whatever means.

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[9]*See, e.g.*, "Duke Prosecutor Throws Out Case Against Players," *New York Times*, April 12, 2007, Sect. A, p. 1, for a summary of the notorious Duke LaCrosse case and the misconduct of the Durham County, North Carolina, district attorney.

[10]Johns, *supra*, pp. 69-71, and authorities there cited.

C. *Absolute Immunity for Prosecutors Is Not Justified*

1. Absolute Immunity for Illegal and Unconstitutional Actions is Contrary to Democratic Principles

The Court in *Imbler* noted that the decision as to whether prosecutors should enjoy absolute or qualified immunity depended upon "'a balance between the evils inevitable in either alternative.'" 424 U.S. at 428, quoting Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949), *cert. denied*, 339 U.S. 949 (1950). With all due respect to the Court, petitioners suggest that in striking the balance it did, the Court failed to consider the inconsistency of granting a prosecutor, who acts on behalf of the state, absolute immunity for unconstitutional actions, with the principle that the proper authority of the state comes from the people as a whole.

Absolute immunity provides a shield to an official who does not act as a neutral dispenser of justice, as does a judge or member of a jury, but as an advocate against a member of the public.[11] When a prosecutor misuses his authority and maliciously and for improper purposes initiates or conducts a prosecution in order to deprive a person of his or her liberty, it is fully appropriate and consistent with democratic principles for the prosecutor to be held to answer and to provide the wronged individual a full and adequate remedy.

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[11] *See*, Johns, *supra*, at 114-16. *See also*, Justice Scalia, concurring in part and dissenting in part in *Burns v. Reed*, 500 U.S. 478, 500 (1991): "[T]he touchstone for its [absolute judicial immunity] applicability was performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights."

2. Prosecutors Did Not Have Absolute Immunity in 1871

As the Court noted in *Imbler*, 42 U.S.C. § 1983, the basis for suits for damages for violations of civil or constitutional rights, does not provide for immunity, absolute or otherwise, from such suits for prosecutors. 424 U.S. at 417. *See also*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). *Imbler* cited *Tenney v. Brandhove*, 341 U.S. 367, 376, 379 (1951), which held that 1983 should be read in light of the law regarding immunity as it existed in 1871, when the precursor to section 1983 was enacted. 424 U.S. at 417-18. The Court concluded, from its review, that absolute immunity for prosecutors had been established as of 1871 and, therefore, should be read into the statute. 424 U.S. at 420-24.

With all respect, this conclusion was erroneous and should be re-examined. As Justice Scalia has pointed out in his concurrence in *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997), "There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted." *See*, Johns, *supra*, at 104-119, for an exhaustive discussion of the issue. Since the existence of an immunity under the common law as it existed in 1871 is a requirement for it to be read into section 1983, the Court should grant certiorari to re-examine the issue of whether absolute immunity for prosecutors as of that date was in fact recognized. [12]

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[12] As Justice Scalia has noted:

> While we have not thought a common law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, see *Scheuer v. Rhodes*, 416 U.S. 232 (1974), we have thought it to be a *necessary* one. . . . Where we have found that a tradition of absolute immunity did not

3. Qualified Immunity Will Provide Prosecutors With Adequate Protection from Baseless Lawsuits

Certiorari should be granted to re-examine the continuing validity of the policy reason for adopting absolute, rather than qualified, immunity for prosecutors. As Ms. Johns demonstrates, the changes in the law of qualified immunity have resulted in that defense providing ample protection to honest prosecutors exercising legitimate discretion as they carry out their duties. Johns, *supra*, at 127-135.

Thus, for example, under qualified immunity standards, a plaintiff must not only show that the criminal prosecution ended in his or her favor, but prove that the prosecutor violated the Constitution knowingly and deliberately. Moreover, since *Imbler*, the law of qualified immunity insures that baseless actions can be eliminated early on in the litigation. The standard for establishing qualified immunity is now objective, so that a prosecutor could be sued only if he violated a clearly established constitutional right that he knew or should of been aware of. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In addition, a prosecutor now may take an interlocutory appeal of a trial court's denial of the defense of qualified immunity, thus avoiding lengthy pre-trial discovery and trial if the defense is valid. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

> exist as of 1871, we have refused to grant such immunity under § 1983.

Burns v. Reed, *supra* at 497-498 (1991) (concurring and dissenting) (emphasis in original). *See also*, *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993) (court reporters not entitled to absolute immunity since it did not exist when § 1983 enacted).

In short, the protections afforded prosecutors by the defense of qualified immunity are far greater now than they were when *Imbler* was decided. The continuing validity of the defense of absolute immunity should be re-examined in light of these changes in the law.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFUSION AND CONFLICTS BETWEEN THE CIRCUITS AS TO THE LIMITS TO AND SCOPE OF ABSOLUTE IMMUNITY

There can be little question but that the lower federal courts are in need of guidance and clarification with regard to what acts of a prosecutor are entitled to absolute or to qualified immunity. Thus, in his dissent from the denial of certiorari in *Michaels v. McGrath*, 531 U.S. 1118 (2001), Justice Thomas noted the conflict among the Courts of Appeals on the "important issue" of whether the "subsequent immunized act" by a prosecutor also immunizes the prosecutor for liability for "prosecutorial misconduct in gathering evidence [that] has led to a deprivation of . . . liberty." 531 U.S. at 1118. *See also*, *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007) (noting the lack of a "bright line between advocacy and investigation"); *Prince v. Hicks*, 198 F.3d 607, 612 (6th Cir. 1999) ("The line between conduct that is part of a preliminary investigation and conduct that is intimately associated with the judicial phase of a criminal proceeding is difficult to draw in some cases"); *Milstein v. Cooley*, 257 F.3d 1004, 1011-12 (9th Cir. 2001) (noting that grand juries can be used for investigative or accusatory purposes, and declining to "determine the exact scope of protection afforded by absolute immunity for acts performed by prosecutors before grand juries.")

Ms. Johns, in her article, has documented conflicts between the circuits with regard to at least four issues relating

to absolute immunity for prosecutors:[13] (1) whether a criminal defendant's due process rights are violated when a prosecutor coerces a witness to testify falsely;[14] (2) whether a prosecutor should receive absolute immunity when he fabricates evidence or coerces a witness to testify falsely and then uses this evidence in a judicial proceeding;[15] (3) how to determine whether a prosecutor is acting as an investigator or an advocate when he engages in misconduct after probable cause has been established;[16] and (4) the circuit courts have adopted different approaches to the probable cause requirement for absolute immunity announced by this Court in *Buckley v. Fitzsimmons*, *supra*.[17]

The present case affords the opportunity to resolve conflicts over whether a prosecutor's actions in the absence of probable cause give rise to absolute immunity and the circumstances in which a prosecutor acts, in effect, as a complaining witness rather than an advocate. In the present case, according to the allegations of the complaint, District

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[13]*See*, Johns, *supra*, at 56-57; 87-103.

[14]*Compare, Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000) *and Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *with Zahery v. Coffey*, 221 F.3d 342 (2d Cir. 2000).

[15]*Compare Michaels*, 222 F.3d 118, *with Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001), *and Zahery*, 221 F.3d 342.

[16]*Compare Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995) *with Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003).

[17]*Compare Spurlock v. Thompson*, 330 F.3d 791 (6th Cir. 2003), *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995), *Kohl v. Casson* 5 F.3d 1141 (8th Cir. 1993), *and Hill v. New York*, *supra*, *with Milstein v. Cooley*, *supra*.

Attorney Hallinan was not performing the functions of a prosecutor when: (1) he involved himself in and directed the investigation into purported wrongful actions of plaintiffs Sanders and Robinson, even though the official investigation had concluded that plaintiffs had not committed any such actions; (2) he acted as a complaining witness, rather than an advocate; and (3) he procured the arrest of the plaintiffs even though he knew there was no probable cause for the arrest.

First, with regard to the investigation, the court of appeals upheld the dismissal of plaintiffs' claim that DA Hallinan violated their constitutional rights when he directed and participated in a criminal investigation into their official activities, despite lacking probable cause to do so, on the ground that the claim was that probable cause had to exist before an investigation can commence. App. 2a-3a. However, this holding overlooked the specific claim made by plaintiffs, which was, in essence, that the investigation was done in bad faith and for retaliatory purposes, and not to establish probable cause at all. DA Hallinan, it is alleged, took over and directed the police investigation. At his direction an investigation that had been completed was misdirected in order to attempt to discover evidence of a non-existent cover-up and obstruction of justice. In the words of the complaint:

> 48. Following, and in retaliation for, CHIEF SANDERS' refusal to corrupt the criminal justice system as DA HALLINAN had proposed, and in retaliation for CHIEF SANDERS reporting DA HALLINAN's unethical proposals to Mayor Brown and Gregg Lowder, ... DA HALLINAN intensified his personal investigation of the investigators, completely taking over the police investigation . . . . [he] sought to implicate officers, ranking members and

command staff in a phony cover-up.

Comp., p. 14.

In other words, the claim was not that an investigation was commenced before probable cause had been established, but rather that the purpose of the investigation was never to establish probable cause at all, but to injure the plaintiffs. This case provides an opportunity for the Court to make it clear that investigative activities by a prosecutor are actionable when done for improper purposes and when the result is to deny constitutional rights.

Second, the case raises the issue of whether District Attorney Hallinan was acting as an advocate for the state within the meaning of *Kalina v. Fletcher, supra*, when he stated to the grand jury that "we," meaning himself and other prosecutors "have run into obstruction after obstruction" by the plaintiffs into their investigation of alleged obstruction of justice. Petitioners contend that when Mr. Hallinan made these statements he was not acting as an advocate, but as a witness, since there *was no evidence whatsoever of such obstruction other than Mr. Hallinan's assertions*, and his assertions were false. Thus, if independent evidence of such obstruction had been presented, and the district attorney had been making an advocate's argument based on such evidence, the case would be different. Here, however, it has been alleged that there was no evidence and no basis for concluding that there was probable cause for a charge of obstruction. Thus, the only "evidence" presented to justify the indictment were the untrue factual statements by the district attorney, and, therefore, his role was as a complaining witness.

In *Kalina*, the Court held that a prosecutor was performing the function of a complaining witness when the prosecutor provided sworn testimony to establish the grounds

necessary for issuing an arrest warrant. 522 U.S. at 129-31. This case presents the further question as to when a prosecutor acts as a *de facto* complaining witness when he presents facts to a grand jury that allegedly established the grounds necessary for issuing an indictment. An advocate argues based on independent evidence; he does not "advocate" by testifying himself and then seeking an indictment based solely on that evidence.

Justice Scalia, in his concurring opinion in *Buckley v. Fitzsimmons*, 509 U.S. at 281, noted the potential vagueness of the "'acting-as advocate' principle." This case presents an opportunity for this Court to clarify the scope of protection afforded by absolute immunity for acts performed by prosecutors before grand juries by deciding the issue of when a prosecutor ceases acting as an advocate and becomes a complaining witness under circumstances not heretofore addressed.

Third, here, District Attorney Hallinan, it is alleged, took over the police investigation and misdirected it in order to attempt to discover evidence of a non-existent cover-up and obstruction of justice. In *Buckley*, the allegation was that the prosecutors "fabricated false evidence." When they were unable to obtain reliable boot print evidence, they "obtained a 'positive identification'" from an expert allegedly "well known for her willingness to fabricate unreliable expert testimony." This was done while the investigation was being conducted under the joint supervision of the sheriff and the prosecutor. 509 U.S. at 262, 263, n. 1.

In this case, *no* evidence, fabricated or otherwise, was found and, therefore, just as in *Buckley,* there was never probable cause to proceed to the grand jury, to obtain an indictment, or to arrest and charge the plaintiffs. Indeed, eventually the Superior Court entered an order declaring

Chief Sanders to be factually innocent of all charges brought by DA Hallinan. Pursuant to California law, the finding of factual innocence could not be made "unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." Order of the Superior Court of the State of California In and For the County of San Francisco, August 20, 2003, Exhibit 3 to the Complaint.

In his concurring opinion in *Buckley*, Justice Scalia took the position that prosecutors "cannot 'properly claim to be acting as advocates' *before* they have 'probable cause to have anyone arrested.'" 509 U.S., at 280-81 (emphasis in original). Justice Scalia's position is consistent with the principle that the Court enunciated that "a prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." 509 U.S. at 274. Here, petitioners claim that DA Hallinan took the actions he did precisely before he had probable cause. Thus, this case presents the Court the opportunity to provide guidance to the lower courts as to the proper application of the principles enunciated in *Buckley*.

The important question of the extent to which prosecutors are protected by absolute immunity for acts related to their prosecutorial duties is one that remains open and evolving. In *Kalina v. Fletcher*, 522 U.S. at 125, this Court noted that in *Imbler*, "we did not attempt to define the outer limits of the prosecutor's absolute immunity, but we did recognize that our rationale would not encompass some of his official activities." Despite the series of decisions following *Imbler*, confusions and conflicts among the lower courts, as they have attempted to define the scope of absolute immunity and when qualified immunity is the proper standard, are well documented.

Of course, the abandonment of absolute immunity for prosecutors and the adoption of qualified immunity for all cases would end the confusion and, therefore, is an additional reason for reconsidering the question. Short of that, however, certiorari should be granted to resolve the conflicts and confusions among the courts of appeals discussed above concerning the limits and scope of absolute immunity.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the court below reversed.

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 19, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15256

D.C. No. CV-04-03835-CRB

CHIEF PRENTICE EARL SANDERS; ESPANOLA SANDERS; DAVID R.L. ROBINSON; RAMONA L. MCCANE-ROBINSON,

Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO; CITY AND COUNTY OF SAN FRANCISCO BOARD OF SUPERVISORS; TERENCE HALLINAN, and Does 1 through 100,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

MEMORANDUM*

Before D.W. NELSON, COWEN**, and BERZON, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Appendix A

Prentice Earl Sanders, former chief of the San Francisco Police Department (SFPD), and David L. Robinson, the department's former deputy police chief, filed a complaint under 42 U.S.C. § 1983 against Terence Hallinan, former San Francisco District Attorney, as well as against the San Francisco Board of Supervisors and the City and County of San Francisco,[1] alleging that Hallinan violated their constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments when he (1) directed and participated in a criminal investigation against them, while lacking probable cause; (2) engaged in "malicious prosecution" by convening a grand jury and successfully indicting both men for obstruction of justice, again while lacking probable cause; (3) had Sanders and Robinson arrested after securing a grand jury indictment; and (4) made defamatory comments about both men to the local media. They also brought a claim under 42 U.S.C. § 1985, alleging that all of the defendants conspired to deprive them of their constitutional rights. Finally, the appellants brought ten separate state law claims.

We affirm the district court in part and vacate in part.

1. ***Investigation:*** The district court properly dismissed appellants' claim that Hallinan violated their constitutional rights when he directed and participated in a criminal investigation into Sanders's and Robinson's police department activities, despite lacking probable cause to do so. Appellants point to no case law that supports the

1. Appellants' briefs on appeal make no mention of the Board of Supervisors. Their causes of action against that governing body are therefore waived.

proposition that probable cause must exist before an investigation can commence. That is not surprising, given that the impetus behind criminal investigations is to develop probable cause.

Moreover, appellants' rights were not violated when, as a result of the investigation that Hallinan directed, they were temporarily suspended from their SFPD positions. Sanders and Robinson were both "at will" employees of the city and county. *See* San Francisco Charter, art. X, § 10.104 (1996).[2] As a result, neither had a constitutionally protected property interest in continued employment with the police department. *See Portman v. County of Santa Clara*, 995 F.2d 898, 905 (9th Cir.1993).

2. *Prosecutorial immunity*: The contention that Hallinan violated Sanders's and Robinson's constitutional rights when he engaged in "malicious prosecution" by convening a grand jury and securing an indictment despite lacking probable cause was properly dismissed. Prosecutors are entitled to absolute immunity when engaged in activities that are "intimately associated with the judicial phase of the criminal process." *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Burns v. Reed*, 500 U.S. 478, 493 (1991). Hallinan's decision to convene a grand jury to indict Sanders and Robinson is such an activity, even if done while lacking probable cause. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274 n. 5 (1993); *Genzler v. Longanbach*, 410 F.3d 630, 637

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2. Given the public nature of this document, there is no need to act on appellee's motion that the panel take judicial notice of the city charter.

(9th Cir.2005); *Milstein v. Cooley*, 257 F.3d 1004, 1008 n. 3 (9th Cir.2001).

The comments Hallinan made before the grand jury are also within the scope of absolute prosecutorial immunity, because the statements were made as an advocate for the state, a core prosecutorial role. *See Kalina v. Fletcher*, 522 U.S. 118, 126 (1997).[3] Sanders and Robinson contend that by employing the word "we" while arguing that "we" – meaning the prosecutors – "have run into obstruction after obstruction," Hallinan became a complaining witness. Such word choice in the course of advocacy cannot turn a prosecutor into a witness and thereby deprive him of immunity. *Cf. Kalina*, 522 U.S. at 129-31 (holding that a prosecutor cannot "perform[ ] the function of a complaining witness" and be rewarded with absolute immunity, where the prosecutor provided sworn testimony to establish the grounds necessary for issuing an arrest warrant).

3. *Defamation*: The complaint alleges that Hallinan's defamatory comments (1) caused damage to their reputation and thus violated their rights under the First and Fourteenth Amendments; (2) caused damage both to their reputation and their employment interests and thus violated their rights under the Fourteenth Amendment; and (3) contributed to their temporary suspensions from the police department and, thus, gave rise to a First Amendment retaliation claim.

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3. Similarly, "[p]reparing and filing an arrest warrant" are functions for which prosecutors enjoy absolute immunity. *See KRL v. Moore*, 384 F.3d 1105, 1110-11 (9th Cir.2004) (citing *Kalina*, 522 U.S. at 129). As a result, the district court correctly dismissed appellants' claim that Hallinan violated their constitutional rights by having them arrested.

Appendix A

Hallinan is entitled only to qualified immunity for his comments to the press. *See Buckley*, 509 U.S. at 277-78. Also, because Sanders was the only plaintiff who engaged in constitutionally protected speech, by speaking to the Mayor and the executive director of the Mayor's Council on Criminal Justice about Hallinan's "unethical proposals and solicitations," only Sanders can bring a claim under the First Amendment.

Damage to reputation alone is not actionable under § 1983 unless accompanied by injury to "some more tangible interests," *see Paul v. Davis*, 424 U.S. 693, 701-02 (1976), and "the constricture of *Paul v. Davis* . . . cannot be avoided by alleging that defamation by a public official occurred in retaliation for the exercise of a First Amendment right," *see Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1045 (9th Cir.1994) (citing *Patton v. County of Kings*, 857 F.2d 1379 (9th Cir.1988)). Thus, the bare claim that Hallinan's statements damaged appellants' reputations was properly dismissed. Sanders and Robinson's claim that Hallinan's defamatory statements, considered in isolation, caused their temporary suspensions from the police department fares no better. At best, that claim sounds in procedural due process, *see Paul*, 424 U.S. at 701, and Sanders and Robinson would be entitled only to notice and a name-clearing hearing, *see Gini*, 40 F.3d at 1044; *Bollow v. Fed. Reserve Bank of San Francisco*, 650 F.2d 1093, 1100-01 (9th Cir.1981). Appellants are not contesting the absence of such notice and hearings, so this claim fails.

That leaves only Sanders's claim that he was temporarily suspended from his position as police chief as a result of his

decision to exercise his First Amendment rights by speaking to the Mayor and the executive director. To state a successful First Amendment retaliation claim, a plaintiff must "demonstrate, as a threshold matter, that he suffered an adverse employment action." *See Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir.2000). He must also allege that "[2] the speech at issue was constitutionally protected and [3] that the speech was a substantial motivating factor in the adverse employment action." *Id.*[4] We hold that Sanders should have been allowed to amend his complaint as to this cause of action, as it is conceivable that he can state a proper claim if given the opportunity.

First, Sanders's temporary suspension from his position as police chief easily qualifies as an "adverse employment action." *See Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir.2003). Second, while Sanders cannot claim that Hallinan directly suspended him, "[t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978); *see also Gilbrook v. City of Westminster*, 177 F.3d 839, 855 (9th Cir.1999) (holding that "a subordinate cannot use the nonretaliatory motive of a superior as a shield against liability if that superior never would have considered a dismissal *but for* the subordinate's retaliatory conduct") (emphasis added). This standard of causation "closely resembles the standard 'foreseeability' formulation of

4. Appellees concede that Sanders's speech was constitutionally protected.

proximate cause." *Arnold v. Int'l Bus. Mach. Corp.*, 637 F.3d 1350, 1355 (9th Cir.1981); *see also Stevenson v. Koskey*, 877 F.2d 1435, 1438-39 (9th Cir.1989); *Leer v. Murphy*, 844 F.3d 628, 633 (9th Cir.1988).

At this early stage in the litigation, Sanders has not sufficiently pleaded that Hallinan's defamatory comments to the media "caused" – in the proximate cause sense of the word-his suspension. Specifically, Sanders has pleaded that

> DA HALLINAN, by instituting the wrongful grand jury proceedings without probable cause and *by his other wrongful conduct alleged herein, caused* CHIEF SANDERS . . . to be suspended from [his] public service as [a] leader[ ] of the SFPD while the criminal charges were pending, and thus wrongfully deprived [him] of [his] public employment.

(Emphasis added.)

We read the phrase-"his other wrongful conduct alleged herein" – to encompass Hallinan's defamatory comments to the press, actions for which he does not enjoy absolute immunity. In context, however, we read the word "caused" to mean not that Hallinan *directly* caused "some kind of direct personal participation" in Sanders's suspension, but that Hallinan's role was of the more indirect, "setting in motion" kind. *See Johnson*, 588 F.2d at 743. Because Sanders's complaint makes no allegation regarding "reasonable foreseeability" or what Hallinan did "know[ ] or reasonably should [have] know[n]" about what others would do in

response to his defamatory statements, *see id.*, "it fails to state a claim" of this second variety, *see Gini*, 40 F.3d at 1044.

Although the district court dismissed appellants' federal claims without leave to amend, we vacate that order in part and remand with instructions that Sanders be granted leave to amend his complaint so as to properly allege the causation element of his First Amendment retaliation claim. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (en banc) (explaining that " 'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts' " (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995))).

We note that even if Sanders appropriately amends his complaint, he still faces an uphill legal battle: He will have to prove not only that Hallinan acted with the requisite mens rea but also that the defamatory comments – separate and apart from all the other actions, such as the indictment, for which Hallinan enjoys absolute immunity-played a "substantial" or "motivating" role in his suspension. *See Gilbrook*, 177 F.3d at 853.

4. *Municipal Liability*: With respect to appellants' causes of action against the remaining defendant, the City and County of San Francisco, we affirm the district court judgment in part and vacate it in part.

When deciding whether to prosecute an individual, a district attorney in California acts not as an officer of the

city or county, but as an officer of the state. *See Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir.2000). The City and County of San Francisco thus cannot be held liable for Hallinan's decision to convene a grand jury, to secure an indictment against appellants, and subsequently to have them arrested. Because no constitutional violation arose from Hallinan's decision to focus an investigation on Sanders's and Robinson's activities within the SFPD or from Hallinan's defamatory comments considered in isolation, these claims against the City and County of San Francisco were also properly dismissed.

Our decision to allow amendment with regard to Sanders's First Amendment retaliation claim against Hallinan also leads us to do the same with regard to the City and County of San Francisco. While a municipality generally may not be held liable under § 1983 for the torts of its employees, *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978), "liability may . . . attach 'even for an isolated constitutional violation . . . when the person causing the violation has final policymaking authority,' " *Botello v. Gammick*, 413 F.3d 971, 979 (9th Cir.2005) (citing *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir.2003)).

Appellants pleaded that Hallinan had final policymaking authority over all conduct alleged in the complaint. *Weiner* held that under California law, a district attorney acts as a county officer for some administrative, non-prosecutorial purposes. *Id.* at 1030-31. In *Botello*, we held that such "administrative acts," performed "outside the scope of absolute immunity," included a prosecutor's retaliatory conduct against the plaintiff in that case-specifically, conduct

that involved calling the plaintiff's new employer and making "false allegations about [plaintiff's] character and performance at his previous job." 413 F.3d at 974, 979. Here, similarly, the pleadings adequately allege that Hallinan's defamatory statements were made in his capacity as a final policymaking authority for the county.

In light of our decision to grant Sanders leave to amend his complaint with respect to his First Amendment retaliation claim, we vacate the district court's decision to dismiss Sanders's First Amendment retaliation claim against the City and County of San Francisco. Assuming that Sanders properly pleads his First Amendment retaliation claim against Hallinan on remand, the same claim can proceed against the City and County.

5. ***Other Claims*****:** The district court properly dismissed Sanders and Robinson's claim that defendants conspired to violate their civil rights and, thus, violated § 1985. Appellants never alleged in their complaint that the conspirators acted with the requisite "racial, or perhaps otherwise class-based, invidious discriminatory animus." *See Butler v. Elle*, 281 F.3d 1014, 1028 (9th Cir.2002) (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993)).

The district court originally dismissed appellants' ten state law claims without prejudice after dismissing their federal claims. *See* 28 U.S.C. § 1367(c)(3). In light of our decision to partially vacate the district court's order to give Sanders leave to amend his complaint, we also vacate the district court's order to dismiss the state law claims without prejudice, and remand the matter so that the district court

may again decide whether to exercise supplemental jurisdiction over the state law claims. We note that the district court may well again decline to do so, as the four named appellants [5] have brought a wide range of state law claims that have little relationship to the sole surviving federal cause of action against Hallinan and the City and County of San Francisco. *Id.* § 1367(c)(2).

AFFIRMED in part; VACATED in part; REMANDED.

Each party shall bear its own costs.

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5. Appellants Espanola Sanders and Ramona L. McCane-Robinson are only parties to one of the state law claims.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED JANUARY 11, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-03835 CRB

PRENTICE E. SANDERS, et al.,

Plaintiffs,

v.

TERENCE HALLINAN, et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs make federal and state law claims against the former San Francisco District Attorney, Terence Hallinan, the City and County of San Francisco, and the San Francisco Board of Supervisors. Now pending before the Court are defendants' motions to dismiss the federal and state claims. After carefully considering the allegations of the First Amended Complaint, the papers filed by the parties, and having had the benefit of oral argument, defendants' motions are GRANTED as to the two federal causes of action. The ten state law causes of action are DISMISSED WITHOUT PREJUDICE to plaintiffs pursuing those claims in state court.

Appendix B

ALLEGATIONS OF THE COMPLAINT

On November 20, 2002, a street fight occurred on Union Street in San Francisco involving Jade Santaro and Adam Snyder, and three off-duty police officers: Alex Fagan, Jr., Matt Tonsing, and David Lee. FAC ¶ 20. Around noon that same day, Police Lt. Dutto assigned two police inspectors to conduct a full investigation of the incident. *Id.* ¶ 21.

On December 2, 2002, District Attorney Hallinan ("Hallinan") met with Police Chief Earl Sanders ("Chief Sanders") about the incident. Hallinan suggested that Chief Sanders direct the suspect officers to plead to misdemeanors for the fight, and emphasized that if they did so, the officers' cases could be resolved in the same manner as Hallinan's son's assault case. Hallinan informed Chief Sanders that Hallinan's son had received community service for multiple assault convictions. Chief Sanders did not respond. *Id.* ¶ 23.

By the following day, the police investigators had completed their investigation and presented the case to Hallinan for a prosecutorial decision. Hallinan returned the file to the San Francisco Police Department requesting further investigation. *Id.* ¶ 24. In particular, Hallinan "prevailed on Lt. Dutto to interrogate every police officer-no matter their rank or role in the case-about the propriety of the investigation." *Id.* ¶ 26.

On December 11, 2002, the police department submitted its entire file to Hallinan. *Id.* ¶ 27. On January 13, 2003, before he had made any decision on whether to prosecute the police officers involved in the incident, Hallinan met with

Chief Sanders and stated: " 'You know we can still clear this up by having them [the off-duty police officers involved in the INCIDENT] just tell what happened, plead to a misdemeanor and I'll give them a slap on the wrist. Just like my son's case.' " *Id.* ¶ 45 (emphasis in original omitted). Sanders subsequently advised the Mayor and the Executive Director of the Mayor's Council on Criminal Justice of Hallinan's "proposals and solicitations." *Id.* ¶ 47.

In retaliation for Sanders' reporting of Hallinan's conduct, Hallinan orchestrated a massive media campaign defaming Chief Sanders and the command staff. *Id.* ¶ 48.

On February 27, 2003, Hallinan convened a grand jury. *Id.* ¶ 48. Knowing that he did not have any evidence against Chief Sanders and/or any member of the Chief's command staff, *id.* ¶ 28, Hallinan "falsely urged, incited, and inflamed the Grand Jury" that Chief Sanders, Deputy Chief Robinson, and members of the command staff " '. . . obstructed and obstructed and obstructed . . .' the investigation of the incident." *Id.* ¶ 29. At the same time, Hallinan and Assistant District Attorney Albert Murray admitted to the grand jury that there was no evidence of a conspiracy by Chief Sanders, Deputy Chief Robinson, or any of the command staff. *Id.* ¶¶ 30, 31.

The grand jury indicted Chief Sanders, Deputy Chief Robinson and others for conspiracy to obstruct justice. *Id.* Exh. 1. As a result, Chief Sanders and Deputy Chief Robinson were "arrested, fingerprinted, subjected to police mug-shots, arraigned and treated like common criminals." *Id.* ¶ 32.

Appendix B

During Hallinan's investigation of the incident, Hallinan made numerous false statements that implied that Chief Sanders, Deputy Chief Robinson, and the command staff intended to cover-up wrongdoing by themselves and other police officers. *Id.* ¶ 37. He also made false statements to the grand jury. *Id.* ¶ 44.

Hallinan dismissed the charges against Chief Sanders and Assistant Chief Alex Fagan Sr. on March 11, 2003. He stated to the court that after reviewing the transcript of the grand jury proceedings, he was dismissing the charges in the "interest of justice." *Id.* ¶ 33. The court dismissed the charges against the rest of the command staff, including Deputy Chief Robinson, on April 4, 2003. *Id.* ¶ 34. In so ruling, the court made the following findings: "That the District Attorney's office, including DA HALLINAN, had told the Grand Jury on February 27, 2003 that there was not enough evidence to indict on a conspiracy charge, but that DA HALLINAN presented no other charges other than conspiracy; and "That DA HALLINAN and the District Attorney's Office failed to abide by the ethics code for prosecuting attorneys by failing to dismiss the criminal case when they themselves admitted there was no evidence to support the charges." *Id.*

Five months later, the superior court granted Chief Sanders' unopposed motion for a finding of factual innocence pursuant to California Penal Code section 851.8. *Id.* ¶ 35, Exh. 3.

Appendix B

PROCEDURAL HISTORY

Chief Sanders and Deputy Chief Robinson ("plaintiffs") and their wives, subsequently initiated this lawsuit against Hallinan, the City and County of San Francisco, and the San Francisco Board of Supervisors. The First Amended Complaint includes twelve causes of action: 10 state law claims and two federal civil rights claims. Plaintiffs allege that Hallinan's actionable conduct includes indicting plaintiffs without probable cause and in violation of state bar ethics rules, and making defamatory statements about plaintiffs in the news media. FAC ¶ 59.

Now pending before the Court are defendants' motions to dismiss. With respect to the federal claims, defendants contend that plaintiffs have not alleged an actionable constitutional violation and that District Attorney Hallinan is entitled to absolute prosecutorial immunity.

PROSECUTORIAL IMMUNITY

Absolute prosecutorial immunity immunizes a prosecutor from any monetary liability pursuant to 42 U.S.C. section 1983 for actions taken in his role as a prosecutor. Prosecutorial immunity "is based upon the same purpose that underlies the immunity of judges and grand jurors acting within the scope of their duties: to protect the judicial process." *See Milstein v. Cooley*, 257 F.3d 1004, 1007 (9th Cir.2001). "Specifically, absolute immunity for prosecutors is warranted (1) to allow prosecutors to focus their energies on prosecuting, rather than defending lawsuits, (2) to enable prosecutors to exercise independent judgment in deciding

which suits to bring and conducting them in court, (3) to preserve the criminal justice system's function of determining guilt or innocence by ensuring that triers of fact are not denied relevant (although sometimes conflicting) evidence because of prosecutors' fear of suit, and (4) to ensure fairness to defendants by enabling judges to make rulings in their favor without the subconscious knowledge that such rulings could subject the prosecutor to liability." *Id.*

Prosecutorial immunity is based on "the nature of the function performed, not the identity of the actor who performed it." *Id.* at 1008 (internal quotation marks and citation omitted). The official seeking immunity "bears the burden of showing that such immunity is justified for the function in question." *Id.* "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for State, are entitled to the protections of absolute immunity." *Id.* (internal quotation marks and citations omitted). On the other hand, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," the prosecutor is entitled to only qualified immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

Absolute prosecutorial "immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest." *Id.* at 1007-08 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976)). Moreover, prosecutorial misconduct is deterred

"by the threat of criminal prosecution and professional discipline, and by prosecutors' accountability to either superiors or the electorate." *Id.* at 1008.

DISCUSSION

Plaintiffs' complaint includes two federal claims: (1) a 42 U.S.C. section 1983 claim alleging violations of plaintiffs' First, Fourth, Fifth, and Fourteenth Amendment rights; and (2) a conspiracy claim pursuant to 42 U.S.C. section 1985(3).

I. The Section 1983 claim

Plaintiffs' Eighth Cause of Action alleges that Hallinan (1) convened the grand jury proceedings to indict Chief Sanders and Deputy Chief Robinson, even though Hallinan knew he lacked probable cause to believe they had committed a crime (Fourth, Fifth and Fourteenth Amendments); and (2) convened the grand jury proceedings and made public statements criticizing Chief Sanders and Deputy Chief Robinson in retaliation for Chief Sanders' reporting of Hallinan's "plea" discussions (First Amendment).

A. Lack of probable cause (Fourth Amendment claim)

Hallinan is entitled to absolute prosecutorial immunity for securing the indictment against plaintiffs despite knowing that there was no probable cause to indict. When a prosecutor presents evidence to a grand jury to obtain an indictment,

the prosecutor is acting as an advocate for the state. *See Milstein*, 257 F.3d at 1012 (holding that prosecutor was entitled to absolute immunity on claim arising from the prosecutor's initiation of grand jury proceedings in order to indict the plaintiff).

Plaintiffs respond that under the Supreme Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), absolute immunity does not attach until a prosecutor has probable cause to believe a crime has been committed; since the complaint alleges Hallinan did not have probable cause, plaintiffs' argument goes, absolute immunity does not apply to securing the grand jury indictment.

In *Buckley*, the plaintiff claimed that prosecutors had fabricated expert bootprint evidence in order to tie the plaintiff to the murder of a child. The Supreme Court, applying the functional test for absolute immunity, held that the prosecutors were not entitled to absolute immunity because the fabrication of evidence was an "investigatory" act committed before the grand jury was empaneled: "Respondents have not cited any authority that supports an argument that a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law. . . . It therefore remains protected only by qualified immunity." *Id.* at 275.

The lack of probable cause at the time of the prosecutors' fabrication of evidence was an important factor in the Court's determination that the fanction performed by the prosecutors at that stage was as an investigator rather than an advocate.

Id. at 274-75. The Court did not hold, however, that even when a prosecutor is indisputably performing an act related to judicial proceedings, such as initiating a prosecution, absolute immunity does not apply if the prosecutor does not have probable cause to believe a crime has been committed. To the contrary, the *Buckley* Court confirmed that absolute immunity applies to a prosecutor's initiation of a prosecution *even when the prosecutor lacks probable cause:*

> [T]here is no "true anomaly," ... in denying absolute immunity for a state actor's investigative acts made before there is probable cause to have a suspect arrested *just because a prosecutor would be entitled to absolute immunity for the malicious prosecution of someone whom he lacked probable cause to indict.* That criticism ignores the essence of the function test. The reason that lack of probable cause allows us to deny absolute immunity to a state actor for the former function (fabrication of evidence) is that there is no common-law tradition of immunity for it, whether performed by a police officer or a prosecutor. The reason that we grant it for the latter function (malicious prosecution) is that *we have found a common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not.*

Id. at 274 n. 5 (emphasis added).

Plaintiffs have not alleged that Hallinan violated their Fourth Amendment rights by doing anything that could be

considered an investigative act, such as the fabrication of evidence; instead, plaintiffs allege that Hallinan violated their rights when he secured the grand jury indictment, even though there was no evidence-even fabricated evidence-to support an indictment. As the *Buckley* Court explained, a prosecutor's malicious prosecution is entitled to absolute immunity, whether the prosecutor has probable cause or not.

The Ninth Circuit's decision in *Milstein* confirms that absolute immunity applies here. There the plaintiff alleged that the prosecutors framed him by fabricating evidence which they then presented to the grand jury. 257 F.3d at 1006. Shortly after the grand jury indicted, a court dismissed the indictment. *Id.* The plaintiff sued for violation of his constitutional rights and challenged, among other things, the prosecutors' securing the grand jury indictment and their conduct before the grand jury. *Id.* at 1011-12. The Ninth Circuit affirmed the dismissal of the claim on a Rule 12(b)(6) motion on the ground that the prosecutors were entitled to absolute immunity: "Milstein's allegations as to this particular grand jury focus on [the prosecutors'] efforts to indict, not to investigate a crime. Initiating a prosecution has consistently been identified as a function within the prosecutor's role as an advocate." *Id.* at 1012. Plaintiffs' complaint alleges that Hallinan, like the prosecutors in *Milstein*, secured an indictment even though he knew there was no probable cause. Like the *Milstein* prosecutors, he is entitled to absolute immunity.

Appendix B

B. First Amendment claim

Plaintiffs also allege that Hallinan secured the grand jury indictment and made false and inflammatory public statements about plaintiffs in retaliation for Sanders' complaint to the mayor about Hallinan's ethics.

In order to state a section 1983 First Amendment retaliation claim, plaintiffs must allege that a state official-here Hallinan-deprived plaintiffs of a valuable privilege or benefit. *See Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1045 (9th Cir.1994). Plaintiffs allege two such deprivations: (1) the indictment and subsequent arrest, and (2) Hallinan's defamatory statements.

As is explained above, Hallinan is entitled to absolute immunity from section 1983 liability for securing the grand jury indictment. *See Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir.2003) (holding that prosecutors were entitled to absolute immunity on claim that they prosecuted the plaintiff in retaliation for her complaint about the city council).

The remaining question, then, is whether Hallinan's defamatory remarks about plaintiffs' alleged obstruction are sufficient to state a claim for violation of the First Amendment. They are not. Damage to reputation is not actionable under section 1983 unless it is accompanied by "some more tangible interests." *See Paul v. Davis*, 424 U.S. 693, 701-02 (1976). In *Paul*, the defendant police officers distributed 800 flyers identifying the plaintiff as a "known shoplifter." *Id.* at 695. The Supreme Court concluded that

the damage to the plaintiff's reputation was not a sufficient deprivation of "liberty" or "property" to be actionable under section 1983. *Id.* at 701-02; *see also Weiner v. San Diego County*, 210 F.3d 1025, 1032 (9th Cir.2000) (holding that district attorney's defamatory statements about the plaintiff were not actionable under section 1983). The Ninth Circuit has specifically held that the Supreme Court's decision in *Paul v. Davis* cannot be avoided by simply alleging that the defamatory statements were made in retaliation for protected speech. *See Gini*, 40 F.3d at 1045; *Patton v. County of Kings*, 857 F.2d 1379, 1381 (9th Cir.1988).

Plaintiffs do not allege that anything more than damage to reputation resulted from the defamatory statements: for example, they do not allege that plaintiffs' employment was terminated as a result of the statement. Thus, plaintiffs do not have a federal civil rights claim arising from the defamatory statements; instead, "[f]or any defamation and damage flowing from it, [plaintiffs have] a tort remedy under state law, not under the First Amendment." *Gini*, 40 F.3d at 1045.

C. Fifth Amendment claim

Plaintiffs also allege Hallinan deprived them of their Fifth Amendment rights by (1) investigating plaintiffs without probable cause, and (2) having plaintiffs arrested. As for the latter allegation, Hallinan is entitled to absolute prosecutorial immunity as the arrest arose from the indictment. As for the former, plaintiffs do not cite any case that suggests that a prosecutor must have probable cause to

believe one has committed a crime before requesting an investigation. In addition, they do not cite any case that suggests that being a target of a law enforcement investigation is actionable under section 1983. *See generally Tomer v. Gates*, 811 F.2d 1240, 1242 (9th Cir.1987) (no constitutional right not to be subject to an investigation based on fabricated evidence).

D. Fourteenth Amendment claim

Finally, plaintiffs contend that the following allegations state a claim for violation of their substantive and procedural due process rights: (1) Hallinan's convening the grand jury without any evidence that plaintiffs had committed a crime; (2) Hallinan's admission to the grand jury that he had no such evidence, and then nonetheless inciting the grand jury to indict; (3) Hallinan's retaliating against Chief Sanders by obtaining the grand jury indictment and making defamatory statements. Plaintiffs' Opposition at 10-11 (citing FAC ¶ 94-96) These allegations, of course, all fail for the reasons stated above. Hallinan is entitled to absolute immunity for all of his conduct in connection with the grand jury, and defamatory statements are not actionable under section 1983.

II. Section 1985

Plaintiffs' other federal claim is brought pursuant to 28 U.S.C. section 1985. Under section 1985(3) (the only section that may apply here), the plaintiff must allege the following elements: (1) a conspiracy, (2) a purpose of depriving any person or class of persons of equal protection of the laws, (3) an act in furtherance of the conspiracy, and

(4) injury to a person or property or deprivation of any right or privilege of a citizen of the United States. *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). There must be shown some class-based, invidious discriminatory animus behind the conspirators' action. *Id.* at 102. In order to be protected, the class of members involved must be treated differently than members of other classes with no rational justification for the difference in treatment. *See e.g., McCalden v. California Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir.1990).

Plaintiffs do not identify the members of the alleged conspiracy, let alone allege that the conspiracy was based on some class-based invidious discriminatory animus. They also do not attempt to defend this claim in their opposition. The claim fails on its face as to all defendants.

III. The County defendants

The Court's discussion of absolute prosecutorial immunity assumes that the allegation that Hallinan maliciously prosecuted plaintiffs states a claim for violation of federal constitutional rights. The next question, then, is whether despite Hallinan's immunity, the City and County of San Francisco and the San Francisco Board of Supervisors can nonetheless be held liable for his conduct.

Plaintiffs' complaint does not make any allegations which would make the San Francisco Board of Supervisors liable for Hallinan's conduct; accordingly, the section 1983 claim against the Board of Supervisors must be dismissed.

Appendix B

As to the City and County of San Francisco, "[p]ursuant to 42 U.S.C. § 1983, a local government may be liable for constitutional torts committed by its officials according to municipal policy, practice, or custom." *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir.2000). "To hold a local government liable for an official's conduct, a plaintiff must establish that the official (1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Id.* (citing *McMillian v. Monroe County Alabama*, 520 U.S. 781, 785 (1997)).

Plaintiffs allege that Hallinan had final policymaking authority with respect to the indictment and that he was the policymaker for the City and County of San Francisco for the conduct at issue. FAC ¶ 11. The *Monell* claim against the City and County of San Francisco nonetheless fails as a matter of law, because the Ninth Circuit has held that when a prosecutor acts as an advocate, such as when he initiates a prosecution, he acts as a state officer rather than on behalf of a county. *See Weiner*, 210 F.3d at 1031. Since the City and County of San Francisco was not the actor with respect to Hallinan's securing the indictment, the *Monell* claim against San Francisco fails. *See id.*

CONCLUSION

This lawsuit alleges that former District Attorney Hallinan damaged the plaintiffs by (1) maliciously prosecuting the plaintiffs, and (2) making defamatory

statements. Defamation by a public official is not actionable under section 1983 and, to the extent being wrongfully indicted (but quickly exonerated) is actionable, Hallinan is entitled to absolute prosecutorial immunity. Therefore, the section 1983 claim against Hallinan is DISMISSED.

The section 1983 claim is also DISMISSED as to the City and County of San Francisco and the San Francisco Board of Supervisors. The section 1985(3) claim is also DISMISSED.

The dismissal of the federal claims is without leave to amend as amendment would be futile. At oral argument plaintiffs forthrightly conceded that they had pled all facts available to them, and had made their best attempt to "plead around" absolute immunity.

The state law claims are DISMISSED WITHOUT PREJUDICE to plaintiffs pursuing those claims in state court.

These dismissals should not be viewed as condoning a district attorney filing criminal charges against individuals when he believes he has insufficient evidence of wrongdoing. Such prosecutorial misconduct, if it occurred as alleged, can injure the innocent and discredit the criminal justice system. A district attorney, in the discharge of his public responsibilities, cannot justify this unethical conduct.[1]

1. The Rules of Professional Conduct of the State Bar of California provide: "A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause." Rule 5-110.

Nevertheless, for the reasons stated above, this Court is constrained to follow the law awarding absolute prosecutorial immunity, no matter how egregious the alleged conduct. Since former District Attorney Hallinan has asked this Court to dismiss the federal action on the basis of absolute immunity, the Court has no choice.

IT IS SO ORDERED.

Dated: January 11, 2005

/s/
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 3, 2007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-15256

D.C. No. CV-04-03835-CRB
Northern District of California,
San Francisco

CHIEF PRENTICE EARL SANDERS; ESPANOLA SANDERS; DAVID R.L. ROBINSON; RAMONA L. MCCANE-ROBINSON,

Plaintiffs - Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO; CITY AND COUNTY OF SAN FRANCISCO BOARD OF SUPERVISORS; TERENCE HALLINAN, and Does 1 through 100,

Defendants - Appellees.

ORDER

Appendix C

Before: D.W. NELSON, COWEN,* and BERZON, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Berzon has voted to deny the petition for rehearing en banc. Judge Nelson and Judge Cowen have recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is DENIED.

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.